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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RALPH COLOMBO, Plaintiff and Appellant, v. NELLIE GAIL RANCH OWNERS ASSOCIATION, Defendant and Respondent.	G047332 (Super. Ct. No. 30-2011-00488012) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Lewis, Judge. Requests for judicial notice. Judgment affirmed. Requests denied.

Ralph Colombo, in pro. per., for Plaintiff and Appellant.

Neuland & Whitney, Frederick T. Whitney and Nancy Michael for Respondent.

* * *

Plaintiff Ralph Colombo appeals from a judgment entered after the trial court sustained a demurrer to his complaint without leave to amend. Respondent Nellie Gail Ranch Owners Association (the Association) successfully argued the complaint was barred by res judicata because it alleges the Association engaged in wrongful conduct which interfered with Colombo's right to construct a barn on his property – the same barn construction placed at issue in earlier litigation between these same parties. In that earlier litigation, the Association obtained a final judgment that allowed it to demolish the partially constructed barn, and then carried out that demolition.

As the Association correctly contends, Colombo's right to complete construction of the barn on his property was actually and necessarily determined in that prior litigation. Although the present complaint alleges distinct wrongful conduct by the Association which was not specifically addressed in the previous case, that distinction does not undermine the preclusive effect of the earlier judgment. The primary issue in both cases was Colombo's right to complete the unfinished construction – or conversely, the Association's right to enter the property and demolish it – and the judgment in the prior case constituted a final adjudication of that claimed right. We consequently affirm the judgment here.

In support of their arguments, both parties have asked us to take judicial notice of additional documents which are contained in the records in other cases. Both Colombo's request, dated May 9, 2013, and the Association's responsive request, dated May 13, 2013, are denied. Those documents were not presented to the court below, and are not relevant in assessing the validity of the claims alleged by Colombo in this case.

FACTS

Colombo filed his complaint against the Association in June 2011, more than four years *after* the Association obtained an injunction in a different action which

permitted it to demolish partially completed structures on his property – including a barn – if he failed to complete construction *of a residence* on the property within a prescribed time period. We affirmed that injunction, as modified, in September 2007. (*Nellie Gail Ranch Owners Ass'n v. Colombo* (Mar. 24, 2008, G038603) [nonpub. opn.] After Colombo failed to complete the construction as required, the Association demolished the improvements in 2011, and we have affirmed the trial court's order awarding it "abatement costs" incurred in that effort. (*Nellie Gail Ranch Owners Ass'n v. Colombo* (Dec. 2, 2013, G047064) [nonpub. opn.].) Against that backdrop, we consider the viability of Colombo's present complaint.

Colombo styles his complaint as one for damages based on claims of alleged breach of the Association's governing documents, intentional and negligent misrepresentation, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. Each of these claims is based on the same alleged wrongful act: i.e., that in August 2005, the Association "wrongly imposed" a set of architectural guidelines which thereafter unfairly restricted his right to build a barn on his property. Allegedly Colombo first learned of the impropriety of the 2005 guidelines in or about February 2009, after a newly composed majority of the Association's Board of Directors rolled back those guidelines and "re[]instated" the property rights he had previously enjoyed under the architectural guidelines which existed prior to 2005.

According to Colombo, he had originally obtained the Association's approval of his barn construction in 2001, in accordance with the architectural guidelines then in effect. However, in October 2005 (four years later), the Association filed its suit against him seeking an injunction requiring him to complete his construction within 365 days. Following service of that complaint, Colombo applied for "re-approval of the barn plans which included a change . . . to the south wall." But Colombo's application to modify the previously approved structure was denied, allegedly based on the wrongfully enacted 2005 architectural guidelines. Between January 2006 and August 2008,

Colombo allegedly made repeated efforts to obtain approval of his modified barn structure, to no avail. Finally, "[a]s a result of [the Association] denying re-approval of Plaintiff's barn and [the] barn's revision of south wall based on the August 2005 [a]rchitectural [g]uidelines . . . , [his] improvements, including the barn[] structure[,] *have been demolished* . . . ." (Italics added.) Each of Colombo's damage claims flows from the Association's demolition of his barn structure.

The Association demurred to Colombo's complaint, arguing among other things that the entire complaint was barred by principles of res judicata and that each cause of action failed to state facts sufficient to constitute a cause of action and was barred by the applicable statute of limitations. In connection with the first assertion, the Association characterized the entire lawsuit as "in essence, a defense to [the] action brought by the Association against Colombo in 2005 . . . . Although Colombo had the opportunity, he failed to raise the arguments asserted in his [c]omplaint as defenses at the trial in the [earlier] matter."

The trial court agreed with the Association, explaining "[t]he dispute as to [Colombo's] barn construction has been finally adjudicated rendering the instant case unsustainable pursuant to the doctrines of res judicata and collateral estoppel[] . . . ."

DISCUSSION

1. Standard of Review

We review the court's demurrer rulings de novo (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415), and the rules we apply are well-settled: "'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a

demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d. 311, 318.) Leave to amend a complaint should not be granted where amendment would be futile. (*Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1100.)

Significantly, because "[a] demurrer tests the sufficiency of a complaint by raising questions of law," we are "not bound by the trial court's construction of the complaint" and we "must make [our] own independent interpretation." (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) Thus, we will affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

2. Collateral Estoppel

At the core of Colombo's present complaint, and each of his causes of action, is the contention the Association wrongfully demolished his partially completed barn structure. All of the damage he alleges was inflicted upon him stems from that demolition, including "devaluation of[his] property due to demolition of party constructed barn structure" and "loss of investment capital and the costs of party construct[ed] improvements including the barn structure." Colombo's misrepresentation causes of action are explicitly based on the theory that absent the Association's "false and misleading statements," he "would have proceeded to complete the construction of his project [and] thus avoided the demolition of his improvements by the Association." His breach of fiduciary duty cause of action alleges that as a result of the Association's

breach, "his project [was] demolished against Plaintiff's will and without just cause . . . ." And his negligent infliction of emotional distress claim is based on the alleged emotional distress he suffered as a result of the "demolition of [his] improvements on his property."

However, as Colombo otherwise acknowledges in his complaint, the Association obtained a court order in an earlier case which expressly allowed it to demolish the partially completed barn structure on his property. Moreover, that demolition was carried out before Colombo filed his complaint.

In support of its assertion that Colombo's entire complaint was barred by principles of res judicata, the Association requested the trial court take judicial notice of its complaint in the earlier case, the judgment rendered in its favor, and our opinion affirming that judgment as modified. As those documents demonstrated, Colombo's right to maintain the partially completed barn structure on his property was placed squarely at issue in that prior case.

Specifically, what the Association alleged in the earlier case was that its 2001 approval of Colombo's planned construction on his property – which included a residence, retaining walls and the barn structure – was conditioned on his commencement and completion of the work in a timely fashion. It alleged Colombo's failure to commence and complete the construction in a timely fashion violated the community's Declaration of Restrictions for Nellie Gail Ranch (identified as the community's "CC&R's") and thus qualified as a nuisance. Among other remedies, the Association sought an injunction allowing it to enter Colombo's property and "immediately remove unapproved improvements on their Lot, *including but not limited to the barn structure* and retaining walls . . . ." (Italics added.) The trial court's judgment, which we affirmed as modified, included an injunction granting the Association that right, but only if Colombo failed to construct *a residence* on his property within a specified time frame. Our opinion expressly noted that the community's CC&R's "*require a completed*

residence if there is going to be a barn on the property . . . ." Colombo did not allege he had completed that residence.

Res judicata, or claim preclusion, is a doctrine which "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Collateral estoppel, or "issue preclusion," is an aspect of res judicata which prevents "relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) Collateral estoppel is applicable "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Ibid*.) Each of those requirements is met here.

As we have already explained, the core issue at the heart of this case is whether the Association had the right to demolish Colombo's barn structure; it is that act of demolition which gives rise to his present damage claims. And it is that precise issue which was actually and necessarily adjudicated in the earlier litigation between these parties, resulting in a judgment that expressly authorized the Association to carry out the demolition if Colombo failed to timely complete construction of a residence on the property.

The judgment required the Association to give Colombo "10-days written notice . . . prior to entering the property to enforce the injunction . . . ," and then expressly allowed the Association to seek reimbursement from Colombo of "all or some of the reasonable and actual costs of abatement on a properly noticed motion." As we have already noted, after the Association completed demolition of the structures on Colombo's

property, it did file a motion to recoup its costs, which the court granted. If Colombo believed the Association's demolition of the structures had been wrongful and inconsistent with the terms of the injunction, it was incumbent upon him to assert that point *as a defense to the claim for reimbursement*. The trial court's award of those expenses, which we have affirmed in a separate opinion filed concurrently herewith, necessarily implied a determination the Association acted appropriately in carrying out that demolition in accordance with the injunction.

Consequently, because the prior case has resulted in a binding determination of both (1) the Association's the right to demolish the barn structure in the absence of a timely completed *residential* structure on the property and (2) that the Association carried out that demolition in accordance with the terms of the injunction, Colombo is precluded from asserting herein that the barn's demolition was wrongful. Moreover, because the Association had the right to demolish the barn in the absence of a completed residential construction, Colombo's alleged effort to obtain approval of a modified version *of the barn structure*, and the Association's allegedly improper rejection of those efforts (for whatever reason) were simply irrelevant. Modification of the barn (or even its completion) would not have saved the structure from demolition.

3. Alleged False Testimony and Misrepresentation

Colombo does allege, albeit in conclusory fashion, that the injunction allowing the Association to demolish his barn structure was obtained "by way of false testimony, misrepresentation and violation of the CC&R's." On appeal, he argues that this assertion of fraud, including what he characterizes as "a new fraud in the presentation of the fact[s] to the Court in order to achieve . . . the demoli[tion of] the improvements on [his] property," justifies the maintenance of his present complaint "in the interest of equity . . . ." However, those allegations, even if fleshed out, would not provide any basis for a present attack on the validity of either the original injunction or the court's

subsequent determination that the demolition was carried out appropriately in accordance with its terms.

California law "forbid[s] direct or collateral attack on a judgment on the ground that evidence was falsified, concealed, or suppressed. After the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified; in the language of the cases, such fraud is 'intrinsic' rather than 'extrinsic.' [Citations.]" (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10.) "'The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter . . . for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive . . . . [¶] . . . [W]hen [the aggrieved party] has a trial, he must be prepared to meet and expose perjury then and there. . . . The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . . .'" (*Id*. at p. 11.)

To the extent Colombo wished to establish that either the injunction itself, or the court's subsequent order awarding the Association reimbursement of its reasonable demolition costs, should have been set aside on the basis it was obtained through fraud, misrepresentation or perjury, he was required to do so within the context of that earlier proceeding, prior to finality of those orders. He cannot do so in this case.

DISPOSITION

"If the complaint does not state a cause of action, and the plaintiff does not show how the defects can be cured, we must affirm the judgment of dismissal if any of the grounds of demurrer is well taken." (*Thornton v. California Unemployment Ins. Appeals Bd.* (2012) 204 Cal.App.4th 1403, 1411.) This is such a case. The judgment is consequently affirmed, and the Association is entitled to recover its costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.